

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SEAN LANE, ET AL.,) CR-08-3845-RS
)
 PLAINTIFFS,) OCTOBER 14, 2009
)
 V.)
)
 FACEBOOK, ET AL.,) PAGES 1 - 62
)
 DEFENDANTS.)
 -----)

THE PROCEEDINGS WERE HELD BEFORE
THE HONORABLE UNITED STATES DISTRICT
JUDGE RICHARD SEEBORG

A P P E A R A N C E S:

FOR THE PLAINTIFFS LAW OFFICES OF JOSEPH H. MALLEY
BY: JOSEPH H. MALLEY
1045 NORTH ZANG BOULEVARD
DALLAS, TEXAS 75208

PARISI & HAVENS
BY: DAVID C. PARISI
15233 VALLEYHEART DRIVE
SHERMAN OAKS, CALIFORNIA 91403

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

A P P E A R A N C E S: (CONT'D)

FOR THE PLAINTIFFS:

KAMBEREDELSON
BY: SCOTT A. KAMBER
11 BROADWAY, 22ND FLOOR
NEW YORK, NEW YORK 10004

BRYDON, HUGO & PARKER
BY: GEORGE A. OTSTOTT
135 MAIN STREET
20TH FLOOR
SAN FRANCISCO, CALIFORNIA
94105

OTSTOTT & JAMISON
BY: GEORGE A. OTSTOTT, SR.
TWO ENERGY SQUARE
4849 GREENVILLE AVENUE
SUITE 1620
DALLAS, TEXAS 75206

FOR FACEBOOK:

COOLEY, GODWARD & KRONISH
BY: MICHAEL RHODES
4401 EASTGATE MALL
SAN DIEGO, CALIFORNIA 92121

FOR HOTWIRE:

JONES, DAY
BY: SHAWN HANSON
555 CALIFORNIA STREET
26TH FLOOR
SAN FRANCISCO, CALIFORNIA
94104

FOR BLOCKBUSTER:

VINSON & ELKINS
BY: MICHAEL L. RAIFF
TRAMMELL CROW CENTER
2001 ROSS AVENUE
SUITE 3700
DALLAS, TEXAS 75201

1 SAN JOSE, CALIFORNIA

OCTOBER 14, 2009

2
3 P R O C E E D I N G S

4 (WHEREUPON, COURT CONVENED AND THE
5 FOLLOWING PROCEEDINGS WERE HELD:)

6 THE CLERK: CALLING CASE NUMBER 08-3845-RS,
7 LANE VERSUS FACEBOOK, ET AL. WOULD COUNSEL COME
8 FORWARD, PLEASE, AND STATE YOUR APPEARANCES?

9 MR. KAMBER: SCOTT KAMBER FOR JOHN LANE,
10 THE PLAINTIFFS.

11 THE COURT: GOOD MORNING.

12 MR. KAMBER: GOOD MORNING, YOUR HONOR.

13 MR. PARISI: DAVID PARISI ALSO ON BEHALF
14 OF PLAINTIFFS.

15 MR. MALLEY: JOSEPH MALLEY ON BEHALF OF
16 PLAINTIFFS.

17 MR. RHODES: GOOD MORNING. MIKE RHODES
18 ON BEHALF OF FACEBOOK.

19 THE COURT: GOOD MORNING.

20 MR. OTSTOTT: GOOD MORNING. GEORGE
21 OTSTOTT ON BEHALF OF THE INTERVENORS.

22 THE COURT: GOOD MORNING.

23 MR. OTSTOTT: GEORGE OTSTOTT, SENIOR ALSO
24 ON BEHALF OF THE INTERVENORS.

25 MR. WILSON: GOOD MORNING. JEREMY WILSON

1 ON BEHALF OF THE INTERVENORS.

2 MR. RAIFF: GOOD MORNING, YOUR HONOR.

3 MIKE RAIFF ON BEHALF OF BLOCKBUSTER.

4 MR. HANSON: SHAWN HANSON ON BEHALF OF
5 THE DEFENDANT HOT WIRE.

6 THE COURT: GOOD MORNING. IS EVERYBODY
7 ACCOUNTED FOR?

8 ALL RIGHT. LET ME MAKE SOME PRELIMINARY
9 OBSERVATIONS HAVING READ THROUGH THE PAPERS.

10 LET ME FIRST JUST TELL YOU WHAT I READ
11 THROUGH. I HAVE THE MOTION FOR PRELIMINARY
12 APPROVAL AND THEN I HAVE THE MOTION TO INTERVENE.

13 I REVIEWED THE OPPOSITION THAT WAS
14 INITIALLY FILED BY FACEBOOK AND AN OPPOSITION FROM
15 PLAINTIFFS IN THIS CASE, AN OPPOSITION TO
16 INTERVENTION FILED BY BLOCKBUSTER AND THE VARIOUS
17 PAPERS ASSOCIATED WITH ALL OF THOSE PLEADINGS. SO
18 THAT'S WHAT I HAVE TAKEN A LOOK AT.

19 LET ME GIVE YOU MY TENTATIVE THOUGHTS AND
20 YOU CAN ALL SIT DOWN.

21 MR. RHODES: THANK YOU, YOUR HONOR.

22 THE COURT: I AM SKEPTICAL OF THE MOTION
23 TO INTERVENE. I SHOULD FIRST SAY IS WHAT I WOULD
24 LIKE TO TAKE UP FIRST IS THE MOTION TO INTERVENE,
25 AND THEN I'LL TAKE UP THE QUESTION OF PRELIMINARY

1 APPROVAL.

2 GOING TO THE MOTION TO INTERVENE, I'M
3 SKEPTICAL ON ANY RIGHT TO INTERVENE BE IT OF RIGHT
4 OR PERMISSIVE IN THIS INSTANCE.

5 STARTING FOR A MOMENT ON THE QUESTION OF
6 WHETHER OR NOT A NOTICE OF RELATED ACTION SHOULD
7 HAVE BEEN FILED, THE OPERATIVE LOCAL RULE PROVISION
8 IS 3-13, NOT 3-12 WHICH THE PLAINTIFFS HAVE SPENT
9 SOME TIME ANALYZING.

10 BUT THAT REFERS TO TWO CASES OR MORE
11 WITHIN OUR OWN DISTRICT.

12 3-13 IS THE OPERATIVE PROVISION. AND I
13 DO THINK THAT THERE IS AN ARGUMENT THAT A NOTICE
14 SHOULD HAVE BEEN FILED HERE THAT THE FOCUS THAT THE
15 FACEBOOK DEFENDANTS ANYWAY SEEM TO ADDRESS IS
16 WHETHER OR NOT THIS CASE IN THIS DISTRICT IS
17 SOMEHOW RELATED TO THE CASE IN TEXAS.

18 I THINK THE FOCUS UNDER 3-13 IS THE TEXAS
19 CASE. THE TEXAS CASE, AS I UNDERSTAND IT, AND THE
20 DRAW IS THE SUBSET OF A CASE THAT IS IN FRONT OF
21 ME. SO I THINK A 3-13 NOTICE PROBABLY SHOULD HAVE
22 BEEN FILED.

23 BUT I THINK THE ABSENCE OF THAT NOTICE
24 DOESN'T RESULT IN THE GRANTING OF A MOTION TO
25 INTERVENE.

1 I HAD SOME, AS I SAID, A GREAT DEAL OF
2 SKEPTICISM ON WHETHER OR NOT INTERVENTION IN THIS
3 INSTANCE IS APPROPRIATE.

4 I HAVE HAD SOME SIGNIFICANT OR SERIOUS
5 QUESTIONS ABOUT THE TIMELINESS OF THE MOTION.

6 I DON'T UNDERSTAND WHY THE OPT-OUT OPTION
7 IS NOT ONE THAT CAN ADDRESS THE CONCERNS THAT THE
8 INTERVENORS PRESENT. AND BEYOND THAT, SHOULD I
9 GRANT PRELIMINARY APPROVAL AT THE FAIRNESS HEARING,
10 I THINK TO THE EXTENT THAT THERE ARE SOME PUNITIVE
11 CLASS MEMBERS THAT ALSO MAY BE PUNITIVE CLASS
12 MEMBERS IN ANY TEXAS PROCEEDING, THEY CAN COME IN
13 AND INDICATE WHATEVER OBJECTIONS THEY MAY HAVE,
14 WHICH MAY INCLUDE SOME OF THE POINTS THAT THE
15 PROPOSED INTERVENORS SUGGEST.

16 BUT THE NOTION THAT THIS CASE SHOULD STOP
17 IN ITS TRACKS, THAT A STAY SOMEHOW SHOULD BE
18 INVOKED, THE CASE ULTIMATELY SHOULD BE TRANSFERRED
19 UNDER SOME RULE AND THERE WAS SOME SUGGESTION 1407
20 WOULD BE THE BASIS BUT THERE'S NO MDL PROCEEDING
21 THAT I'M AWARE OF GOING ON.

22 IT DOESN'T SEEM TO ME TO MAKE A WHOLE LOT
23 OF SENSE, AND I DON'T THINK THAT THERE'S REALLY ANY
24 LEGAL BASIS TO DO IT.

25 SO I AM SKEPTICAL.

1 SO THAT IS THE -- WHERE THINGS STAND.
2 YOU'RE ENTITLED TO KNOW THAT BASED ON WHAT MY
3 REACTION IS BASED ON HAVING READ THE PAPERS, BUT
4 THAT DOESN'T PRECLUDE YOU THE OPPORTUNITY TO
5 PRESENT ARGUMENT AS TO WHY I'M READING THEM WRONG.

6 SO WITH THAT, WHY DON'T I GO AHEAD AND
7 ASK THE PROPOSED INTERVENORS, MR. OTSTOTT AND
8 MR. WILSON, WHOEVER WANTS TO ADDRESS THE ISSUE.

9 AND WHOEVER WANTS TO ADDRESS THE ISSUE,
10 WHY DON'T YOU COME FORWARD AND STAND UP HERE.

11 MR. WILSON: GOOD MORNING, YOUR HONOR.

12 THE COURT: GOOD MORNING. YOU'RE
13 MR. WILSON?

14 MR. WILSON: I AM. AND I RECOGNIZE THAT
15 IT SOUNDS LIKE I HAVE MY WORK CUT OUT FOR ME TODAY.

16 THE COURT: IN FAIRNESS I THOUGHT YOU
17 OUGHT TO KNOW.

18 MR. WILSON: AND I APPRECIATE THAT, YOUR
19 HONOR, BECAUSE I THINK IT GIVES ME A BETTER
20 UNDERSTANDING OF HOW I NEED TO ADDRESS THIS TO THE
21 COURT AND WHAT I NEED TO BRING UP.

22 THE PLAINTIFFS IN THEIR MOTION HAVE
23 RECOGNIZED THAT AS A PRACTICAL MATTER THE
24 INSTITUTION OF THESE ACTIONS ARE NOT FEASIBLE
25 EXCEPT IN A CLASS FORMAT.

1 SO IT BASICALLY INDICATED TO THE COURT
2 THAT ONE OF THE REASONS THAT THE INDIVIDUAL
3 NATURE -- OR THE CLASS ACTION IS THE PREDOMINANT
4 METHOD FOR RESOLVING THIS IS THE RECOGNITION OF
5 THAT FACT.

6 THE COURT: ALTHOUGH YOU HAVE SUGGESTED
7 TO ME THAT ONE OF THE ASPECTS THAT TROUBLES YOU
8 ABOUT THE PROCEEDINGS HERE IS THE STATUTORY
9 PENALTIES IN THE BLOCKBUSTER CASE OF AT LEAST THE
10 2500 PER OCCURRENCE IF I RECALL CORRECTLY.

11 IS THAT REALLY, IF INDEED YOU'RE RIGHT,
12 PERHAPS AN INDIVIDUAL COULD BRING SOME KIND OF A
13 CLAIM, BE IT IN SMALL CLAIMS OR SOMEPLACE ELSE.

14 MR. WILSON: YOUR HONOR, THEY COULD BRING
15 IT FOR THOSE INDIVIDUAL DAMAGES. BUT WHAT WE'RE
16 TALKING ABOUT HERE IS UNDER THE VIDEO PROTECTION
17 ACT, THE VIDEOTAPE SERVICE PROVIDERS CHARGE AS THE
18 GUARDERS AT THE GATES OF THIS INFORMATION. AND
19 THEY ARE CHARGED WITH PROTECTING AND NOT DISCLOSING
20 TO INDIVIDUALS.

21 ONE OF THE CONCERNS WE HAD WITH THE
22 PROPOSED SETTLEMENT IS THAT THERE'S NO INJUNCTIVE
23 RELIEF THAT ACTUALLY RECOGNIZES IN ANY WAY WAYS OF
24 ENSURING THIS TYPE OF THING.

25 THE COURT: WHY CAN'T IT BE BROUGHT TO MY

1 ATTENTION IN THE EVENT THAT I GRANT PRELIMINARY
2 APPROVAL? I MEAN, HAVE A FAIRNESS HEARING.

3 AND TO THE EXTENT THAT ANY OBJECTOR COMES
4 IN AND SAYS THAT THIS IS AN OUTRAGEOUSLY UNFAIR
5 CLASS SETTLEMENT AND YOU WOULD BE DISADVANTAGING
6 THESE MEMBERS, WHY COULDN'T IT BE PRESENTED TO ME
7 AT THAT TIME?

8 MR. WILSON: BECAUSE AN INITIAL DECISION
9 HAS TO BE MADE AT THIS COURT RIGHT NOW THAT ALL THE
10 CLAIMS ARE TYPICAL AND COMMON AND NO CLAIMS ARE
11 STANDING OUT AS STRONGER THAN THE OTHERS.

12 AND WE WOULD SUBMIT THAT POSTPONING THAT
13 DETERMINATION UNTIL FAIRNESS, THERE'S ALMOST A
14 PRESUMPTION CREATED, AND I BELIEVE IT'S A STRONG
15 AMOUNT OF MOMENTUM. WE'RE TALKING ABOUT ALLOWING
16 THE PARTIES TO SPEND A GREAT DEAL OF MONEY NOTICING
17 THIS ACTION.

18 THE COURT: WELL, YOU KNOW, IN THIS DAY
19 AND AGE, AND THIS IS JUMPING A LITTLE AHEAD TO THE
20 PRELIMINARY APPROVAL, BUT WE LIVE IN AN AGE WHERE
21 NOTICE IS NOT QUITE AS DAUNTING A PROCESS BECAUSE
22 OF THE ELECTRONIC NATURE OF THE NOTICE.

23 I RECOGNIZE THAT A PROPOSAL TO DO A
24 PUBLICATION IN "U.S.A. TODAY" AND THEN IN ADDITION
25 TO THAT THE ELECTRONIC NOTICE.

1 YOU MAY BE RIGHT THAT THERE IS SOME
2 MOMENTUM ASPECT TO IT, BUT MAYBE I'M WRONG, BUT I
3 DON'T VIEW MY ROLE IN THE EVENT THAT I GIVE SOME
4 PRELIMINARY APPROVAL AS PREJUDGING THE QUESTION.

5 I MEAN, I FEEL I'M PERFECTLY CAPABLE OF
6 SAYING AT THE FAIRNESS HEARING, WELL, I MAY HAVE
7 INITIALLY THOUGHT THAT THERE WAS A BASIS TO GO
8 FORWARD, BUT I DON'T FEEL MYSELF CONSTRAINED. I
9 WOULD NOT TAKE KINDLY, I GUESS, A BETTER WAY TO SAY
10 IT TO AN ARGUMENT, WELL, JUDGE YOU ALREADY DECIDED
11 TYPICALITY, COMMONALITY AND ALL OF THE REST. I
12 DON'T THINK SO.

13 MR. WILSON: WELL, YOUR HONOR, AND I
14 DIDN'T MEAN TO SUGGEST THAT YOU WOULD DO SO AND IF
15 THAT'S THE WAY YOU INTERPRETED MY REMARKS, THEN
16 THAT'S NOT THE WAY I INTENDED THEM.

17 THE POINT THAT I WAS TRYING TO GET ACROSS
18 WAS THAT THE SUPREME COURTS AND THE APPELLATE
19 COURTS HAVE LOOKED AT THIS AND MADE CLEAR THAT THE
20 MOMENT OF CERTIFICATION, EVEN FOR SETTLEMENT
21 PURPOSES, IS A MOMENT OF HEIGHTENED SCRUTINY.

22 AND THE REASON FOR THAT IS IT'S A NON
23 ADVERSARIAL PROCEEDING. ALL PARTIES ARE AGREEING
24 IT LOOKS ALL GOOD AND IT'S BUNDLED UP INTO A NICE
25 BOW AND LOOK HOW COMMON LAW CLAIMS ARE.

1 AND BY MAKING A DETERMINATION -- SO THE
2 COURTS HAVE CHARGED THIS COURT WITH DETERMINING
3 THOSE SORTS OF THINGS ON A PRELIMINARY BASIS.

4 AND SO ONCE THAT PRELIMINARY
5 DETERMINATION IS MADE, THEN, YES, YOU CERTAINLY,
6 YOUR HONOR, WOULD RESERVE THE RIGHT TO DO THAT, BUT
7 YOU HAVE ALREADY TAKEN LARGE STRIDES, REALLY,
8 TOWARDS NOTICING UP THIS CLASS AND NOTICING UP AND
9 PROVIDING EVERYBODY AN OPPORTUNITY TO OBJECT.

10 ONE OF THE THINGS THAT WE NOTE IS THAT
11 THE BYLAWS OF THIS FOUNDATION AREN'T EVEN GOING TO
12 BE SUBMITTED TO THE COURT UNTIL RIGHT BEFORE THE
13 FAIRNESS HEARING.

14 HOW DO WE NOTICE A CLASS EVEN AT THIS
15 POINT OF THE REMEDIES THAT ARE GOING TO BE THE
16 BENEFIT THAT THEY'RE GOING TO BE GETTING TO THIS?
17 HOW DO THE OBJECTORS MAKE AN INFORMED OBJECTION
18 EVEN?

19 THE COURT: OKAY. THAT TAKES ME BACK
20 AGAIN TO WHY ISN'T THE FAIRNESS HEARING TIME TO
21 BRING UP THIS ISSUES?

22 I MEAN, ISN'T IT -- FRANKLY, PLAINTIFFS
23 AND THE DEFENDANTS IN THE CASE ASSIGNED TO ME ARE
24 THE ONES AT RISK.

25 IF THERE'S A FUNDAMENTAL FLAW, SOME OF

1 THE ONES THAT YOU WERE SUGGESTING THAT THE
2 FOUNDATIONAL PROPOSAL WHEN IT FINALLY IS PRESENTED,
3 YOU KNOW, YOU ARGUE OR AN OBJECTOR WOULD ARGUE
4 SOMEHOW, YOU KNOW, IT WAS EPHEMERAL OR WHATEVER.

5 LET'S GET BACK TO THE QUESTION OF WHY
6 SHOULD YOU -- WHY SHOULD I ENTERTAIN THE REMEDY YOU
7 SUGGEST, WHICH IS STOPPING EVERYTHING IN ITS TRACKS
8 HERE AND WITH THE ULTIMATE GOAL, I TAKE IT FROM THE
9 WAY THAT YOU HAVE PRESENTED THE PAPERS THAT
10 EVERYTHING MOVES TO TEXAS EVEN THOUGH AS I
11 UNDERSTAND IT THE TEXAS PROCEEDING IS TO SOME
12 EXTENT A SUBSET OF THE SCOPE OF THE PROCEEDING
13 HERE?

14 WHY SHOULD I STOP EVERYTHING? I GUESS
15 YOUR PRINCIPAL ARGUMENT IS THE FIRST FILED ARGUMENT
16 BUT, YOU KNOW, THE TEXAS PROCEEDING AS I UNDERSTAND
17 IT EFFECTIVELY STOPS BECAUSE THE FIFTH CIRCUIT IS
18 CONSIDERING AN ARBITRATION QUESTION.

19 THE QUESTION IS WHY SHOULD I LET YOU COME
20 IN AND STOP EVERYTHING HERE?

21 MR. WILSON: YOUR HONOR, WHAT I'M ASKING
22 FOR IS THAT THE COURT -- AND I'M AWARE THAT YOU'RE
23 DOING THAT THROUGH THESE PROCEEDINGS, AND I DON'T
24 MEAN TO SUGGEST OTHERWISE.

25 BUT WHAT I'M ASKING FOR IS THAT THE COURT

1 BE VERY CAREFUL AT THIS CRITICAL STAGE OF
2 CERTIFICATION.

3 THE COURTS HAVE SAID, LIKE I SAID BEFORE,
4 THAT IT'S A HEIGHTENED -- IT'S A TIME OF HEIGHTENED
5 SCRUTINY.

6 AND JUST BECAUSE THE PARTIES HAVE COME IN
7 AND AGREED, WE WOULD SUGGEST THAT WE COULD PROVIDE
8 A VALUABLE ROLE.

9 AND IF IN PROVIDING AN ADVERSARIAL
10 BALANCE TO THE ARGUMENTS THAT ARE BEING PRESENTED
11 TO THE COURT AS TO WHY THIS CASE SHOULD BE
12 INITIALLY CERTIFIED, WE HAVE VERY SERIOUS CONCERNS
13 THAT THE VPPA CAUSES OF THIS ARE THE INTEGRAL PART
14 OF THIS AND THOSE CLASS MEMBERS HAVE VERY DIFFERENT
15 RIGHTS AND REMEDIES AVAILABLE TO THEM AND MUCH
16 STRONGER THAN THE REST OF THE CLASS.

17 AND SO WE WOULD SUBMIT THAT AS A
18 PRACTICAL MATTER THAT SHOULD BE EVALUATED AND YOUR
19 HONOR IS DOING THAT THROUGH THIS HEARING, I
20 RECOGNIZE THAT, BUT WE WOULD ARGUE THAT WE SHOULD
21 BE ALLOWED, RATHER THAN ON 20 DAYS NOTICE, 25 DAYS
22 NOTICE FROM THE PARTIES AND US BEING, YOU KNOW,
23 KIND OF STEP BACK ON OUR HEELS BY THE FACT THAT
24 THIS WAS -- FACEBOOK WAS ATTEMPTING TO INDEMNIFY
25 BLOCKBUSTER FOR THIS, YOUR HONOR.

1 WE WOULD SUBMIT THAT WE SHOULD BE ALLOWED
2 TO COME IN AND PROPOSE, YOU KNOW, PRESENT AN
3 INFORMED BRIEFING ON THAT ISSUE BECAUSE IT'S SUCH A
4 CRITICAL TIME IN THE PROCEEDING, YOUR HONOR.

5 THE COURT: LET ME ASK SOME QUESTIONS
6 WITH RESPECT TO DIFFERENCES IN THE RECORD. THERE'S
7 A SUGGESTION IN YOUR PAPERS THAT YOU'VE SORT OF
8 BEEN SANDBAGGED ON ALL OF THIS AND THAT YOU WEREN'T
9 FAMILIAR WITH WHAT WAS GOING ON AND NOW HERE WE ARE
10 AND THIS CASE IS IN CALIFORNIA AND IS PROCEEDING
11 ALONG.

12 BUT THEN I DID RECEIVE SOME -- IT WAS A
13 DECLARATION OF MR. MALLEY AND THAT WAS SUBMITTED BY
14 PLAINTIFFS IN MY CASE THAT SUGGEST, MORE THAN
15 SUGGEST, OR REPRESENT THAT COUNSEL IN THE TEXAS
16 CASE WAS FULLY AWARE OF THIS CASE FOR QUITE SOME
17 TIME.

18 MR. WILSON: AND I'M HAPPY TO ADDRESS
19 THAT TO, YOUR HONOR.

20 THE COURT: OKAY.

21 MR. WILSON: MR. MALLY'S AFFIDAVIT, ONE,
22 IS VERY VAGUE. IT SAYS, "IT WAS COMMUNICATED IN
23 SEPTEMBER OF '08 WHEN THE LANE ACTION WAS FILED AT
24 THE TIME."

25 THE COURT: "IN JUNE OF '08 I HAD

1 COMMUNICATIONS WITH HARRIS COUNSEL IN WHICH I
2 INDICATED THAT I WAS WORKING WITH A NEW YORK LAW
3 FIRM ON A CASE AGAINST FACEBOOK, BLOCKBUSTER, INC.,
4 BLOCKBUSTER AND OTHER COMPANIES REGARDING REGARDING
5 FACEBOOK'S BEACON PROGRAM AND THAT WE ANTICIPATED
6 FILING A COMPLAINT WITHIN A MONTH."

7 MR. WILSON: THAT THEY KNEW THEY WERE
8 GOING TO BE FILING A CLAIM SOMEWHERE, YOUR HONOR,
9 YES. AND I HAVE GONE BACK WITH MR. OTSTOTT SINCE
10 THAT TIME AND THERE WERE REFERENCES TO A FACEBOOK
11 CASE GENERALLY, AND I WAS NOT AWARE OF THAT AT THE
12 TIME THAT I WAS SUBMITTING THAT INFORMATION.

13 THE COURT: DOESN'T THAT KIND OF PUT YOU
14 ON NOTICE THAT, YOU KNOW, YOU NEED TO BE AWARE OF
15 IT AND PERHAPS TAKE A LOOK? IT'S PRETTY EASY THESE
16 DAYS TO DO A REVIEW OF WHAT CASES ARE BEING FILED
17 IN FEDERAL COURTS.

18 MR. WILSON: IN WHICH COURT THOUGH, YOUR
19 HONOR?

20 THE COURT: PARDON?

21 MR. WILSON: IN WHICH COURT?

22 THE COURT: I DON'T THINK THAT'S ALL THAT
23 DIFFICULT ON A NATIONAL BASIS TO DETERMINE WHETHER
24 OR NOT A CASE -- A PUNITIVE CLASS ACTION IS BEING
25 FILED AGAINST FACEBOOK IN ANY OF OUR 93 DISTRICTS.

1 IS IT REALLY THAT DIFFICULT?

2 MR. WILSON: TO SEARCH THEM ALL
3 INDIVIDUALLY FOR FACEBOOK --

4 THE COURT: I DON'T THINK YOU HAVE
5 TO NECESSARILY -- WE'VE GOT LOTS OF DIFFERENT
6 MECHANISMS THESE DAYS THROUGH OUR PACER SYSTEM AND
7 OTHERS TO BE ABLE TO DETERMINE WHETHER OR NOT A
8 CASE HAS BEEN FILED.

9 BUT LET ME JUST GET A BASIC
10 UNDERSTANDING. YOU DON'T DISPUTE THEN THAT THE
11 BASIC OUTLINE OF FACTS AS SET FORTH IN THE MALLEY
12 DECLARATION.

13 YOU'RE JUST SAYING THAT IT DIDN'T MEAN A
14 WHOLE LOT THE DEGREE TO WHICH YOU WERE ADVISED THAT
15 SOMETHING WAS UP WASN'T AS DETAILED AS YOU THOUGHT
16 IT OUGHT TO BE?

17 MR. WILSON: THAT'S CORRECT, YOUR HONOR,
18 I DON'T BELIEVE THAT THAT WAS SUFFICIENT TO PUT US
19 ON NOTICE TO HAVE FOUND THIS LAWSUIT AND TO HAVE
20 REALIZED. AND CERTAINLY EVEN REVIEWING THE
21 RECORDS, YOUR HONOR, BLOCKBUSTER -- AND, FRANKLY,
22 WE'RE GETTING DIFFERENT POSITIONS ON THIS BECAUSE
23 BLOCKBUSTER CLAIMS THAT THEY HAVE NOT BEEN SERVED
24 IN THIS ACTION.

25 THEY HAVE CONSENTED TO PROCEED BEFORE

1 YOU, YOUR HONOR, RATHER THAN THE DISTRICT JUDGE IN
2 THIS ACTION FOUR DIFFERENT DOCUMENTS THAT THEY HAVE
3 FILED IN THIS CASE CLAIMING THAT THE OBJECTIVE
4 CLAIM IN THE LAST ONE THAT WE HAVE NOT APPEARED AND
5 WE HAVE NOT BEEN SERVED AND WE DIDN'T HAVE ANY
6 OBLIGATIONS UNDER 3-13. WE DIDN'T HAVE ANY -- AND
7 CERTAINLY, AS THE COMMON DEFENDANT AND GIVEN THE
8 YOUR READING OF 3-13, WHICH WE BELIEVE IS THE
9 CORRECT ONE, YOUR HONOR, THAT IT WAS THE SIMILARITY
10 AND HAD THIS ACTION HAD ALL OF THE SAME DEFENDANTS
11 AS THAT ACTION, BLOCKBUSTER HAS BEEN SITTING ON THE
12 SIDELINES OF THIS KIND OF TAP DANCING OF ARE WE IN
13 THIS CASE OR ARE WE NOT IN THIS CASE? BUT YET
14 SIGNING STIPULATIONS TO PROCEED BEFORE YOU THAT
15 WERE CLEARLY DESIGNED, GIVEN THE TIMING OF THIS, TO
16 PUSH THIS CASE FORWARD TO RESOLUTION.

17 THE COURT: WHAT FLOWS FROM A
18 DETERMINATION THAT 3-13 NOTICE SHOULD HAVE BEEN
19 FILED?

20 I MEAN, LET'S ASSUME, AND AS I'M
21 INDICATING TO YOU I'M KIND OF INCLINED TO THINK
22 THAT THEY SHOULD HAVE FILED MORE, WHERE DO WE GO
23 FROM THERE?

24 WHAT REMEDY DO YOU -- IS THE REMEDY THAT
25 YOU GET TO INTERVENE BECAUSE A 3 -13 NOTICE SHOULD

1 HAVE BEEN FILED?

2 MR. WILSON: NO. AND I ATTEMPTED TO
3 OUTLINE THIS IN MY DOCUMENTS, AND PERHAPS I WASN'T
4 CLEAR.

5 WHAT IT SHOULD HAVE TRIGGERED WAS AN
6 INQUIRY BY THE COURT WHERE WHAT WE ARE ASKING THE
7 COURT TO DO NOW IS TO DETERMINE THE OVERLAPPING
8 NATURE AND DETERMINE HOW RELATED THESE ACTIONS ARE
9 AND WHETHER, IN FACT, THEY SHOULD BE PROCEEDING
10 TOGETHER.

11 YOUR HONOR, WE HAVE BEEN DILIGENTLY
12 TRYING TO PROSECUTE AND TO PROTECT THE -- AN
13 INTEREST FOR A CLASS OF INDIVIDUALS THAT WERE A
14 SUBSET OF THIS CLASS THAT WERE BLOCKBUSTER USERS.

15 AND PLAINTIFFS' COUNSEL APPARENTLY
16 ALLOWED, I DON'T KNOW IF THEY DIDN'T SERVE
17 BLOCKBUSTER IF BLOCKBUSTER SAYS.

18 THERE WAS NO RETURN SERVICE FILED ON THE
19 DOCKET SHEET. APPARENTLY THEY WERE CONTACTED BY
20 FACEBOOK AT THE VERY BEGINNING, AND THE ONLY REASON
21 I CAN ASSUME THAT THEY DIDN'T SERVE BLOCKBUSTER IN
22 THIS CASE BECAUSE THEY WERE ASSURED BY FACEBOOK
23 THAT FACEBOOK WAS GOING TO RESOLVE THIS ALL ON
24 BLOCKBUSTER'S BEHALF.

25 THE COURT: THEY'RE MAKING AN AWFUL LOT

1 OF ASSUMPTIONS.

2 MR. WILSON: THERE'S NOT REALLY ANY REAL
3 REASON -- YOUR HONOR, WHY WASN'T -- BLOCKBUSTER
4 HASN'T MOVED TO, FOR INSTANCE, DISMISS THIS ACTION
5 IN 120 DAYS AS THE RULES REQUIRE.

6 BLOCKBUSTER HAS NOT COMMITTED IN ANY WAY
7 AND ASSERTED ITS ARBITRATION RIGHTS, BUT YET THEY
8 HAVE CONSENTED TO PROCEED BEFORE THIS COURT.

9 THE COURT: WHY WOULDN'T THEY?

10 MR. WILSON: BECAUSE, YOUR HONOR, THE
11 PARTIES TO THIS ACTION ATTACH ON THEIR RIGHTS 14
12 MONTHS. I'VE ARGUED TO THE DISTRICT COURT IN TEXAS
13 IN THE RECENT FILING EARLIER THIS WEEK THAT
14 BLOCKBUSTER HAS BEEN PURSUING INCONSISTENT
15 REMEDIES.

16 THEY HAVE ARGUED IN THE COURT IN TEXAS,
17 AND I OUTLINED THIS A LITTLE BIT IN MY BRIEF, THAT
18 ALL CLAIMS ARE SUBJECT TO ARBITRATION AND MUTUALLY
19 BINDING.

20 THE COURT: RIGHT.

21 MR. WILSON: WHEN THEY'RE SUED OVER HERE
22 AND IT LOOKS LIKE FACEBOOK MIGHT RESOLVE THE CASE
23 FOR THEM, THEY DON'T WANT TO ASSERT THAT.

24 BUT YET -- AND IF THEY HADN'T BEEN SERVED
25 AND HADN'T APPEARED THEN I GUESS THEY WOULD HAVE A

1 BETTER ARGUMENT BUT CONCEDING TO PROCEED BEFORE THE
2 MAGISTRATE JUDGE TAKING AN ACTIVE STEP, THEY WAIVE
3 THEIR CONSTITUTIONAL RIGHTS ON BEHALF OF THEIR
4 DEFENDANT SIX WEEKS AFTER A MEMORANDUM OF
5 UNDERSTANDING IS SIGNED BY THE PARTIES ON DECEMBER
6 9TH AS THEY OUTLINED STATING PRESUMABLY THAT
7 FACEBOOK IS GOING TO -- THEY SAID ALL SUBSTANTIVE
8 RELIEF IS DECIDED AT THAT TIME.

9 BLOCKBUSTER TAKES AN AFFIRMATIVE STEP,
10 THE ONLY THAT THEY DIDN'T CONSENT TO THE MAGISTRATE
11 JUDGE PROCEEDING IN TEXAS, THEY TOOK THAT ACTIVE
12 STEP BECAUSE THEY WANTED ALL OF THEIR CLAIMS
13 RESOLVED IN AN NONARBITRATABLE FORUM.

14 THE COURT: LET'S ASSUME THAT THAT'S
15 CORRECT. WHAT HAVE THEY DONE WRONG?

16 I MEAN, LET'S ASSUME THAT THEY HAVE
17 STRATEGIZED AS YOU SUGGESTED AND AGAIN THEY RISE OR
18 FALL, THE SETTLEMENT OF THE REPUTED CLASS WILL RISE
19 OR FALL IF I GIVE PRELIMINARY APPROVAL AT THE
20 FAIRNESS HEARING.

21 SO I'M NOT SUGGESTING THAT IT IS
22 APPROPRIATE FOR A PARTY TO DO SOME END RUN AROUND
23 THAT PROCESS, BUT THAT PROCESS WILL OCCUR. AND TO
24 THE EXTENT THAT THERE ARE OBJECTIONS BY PUNITIVE
25 CLASS MEMBERS, THOSE WILL BE CONSIDERED.

1 BUT BLOCKBUSTER'S DECISION OR DECISION
2 NOT TO ACTIVELY PARTICIPATE IN ONE FORUM AND PURSUE
3 CERTAIN REMEDIES IN ANOTHER FORUM, IS THERE SOME
4 IMPROPRIETY IN THAT?

5 YOU'RE SUGGESTING THAT THERE IS. IT MAY
6 BE THAT IT IS A STRATEGY THAT AT END OF THE DAY
7 DOESN'T WORK IF I DETERMINE THAT IT'S NOT AN
8 ADEQUATE SETTLEMENT HERE.

9 BUT YOU'RE SUGGESTING THAT IT'S
10 NEFARIOUS, AND THAT'S WHAT I'M NOT QUITE SURE I'M
11 FOLLOWING.

12 MR. WILSON: THEY'RE TAP DANCING ON THEIR
13 OBLIGATIONS.

14 THE COURT: A LOT OF PEOPLE TAP DANCE IN
15 COURTS AROUND THE COUNTRY. AND THERE'S A POINT AT
16 WHICH THAT ACTIVITY MAY SAY, WELL, YOU'RE DOING
17 SOMETHING IMPROPER, BUT THERE'S ALSO A POSSIBILITY
18 THAT THEY'RE DOING SOMETHING, YOU KNOW, THAT
19 PROTECTS THEIR INTEREST.

20 I MEAN, WHERE IS THE LINE CROSSED HERE?

21 MR. WILSON: ONE OF THE ARGUMENTS THAT WE
22 HAVE MADE IN THE TEXAS ACTION, YOUR HONOR, IS BY
23 TAKING THIS ACTIVE STEP IN THIS COURT THEY HAVE
24 WAIVED -- THEY HAVE ELECTED A RIGHT THAT IS
25 INCONSISTENT. THEY HAVE ELECTED TO PROCEED IN AN

1 NONARBITRATABLE FORUM.

2 THE COURT: OKAY.

3 MR. WILSON: AND THEY THEREBY WAIVE THEIR
4 RIGHT TO ARBITRATION. THAT'S AN IMPORTANT DEFENSE
5 THAT BLOCKBUSTER WAS SUBMITTING, AND WE WOULD THINK
6 THAT WE HAVE CLEARED A VERY SIGNIFICANT HURDLE
7 BECAUSE OF THEIR ACTIONS IN THIS CASE.

8 WE THINK THAT THE BLOCKBUSTER DEFENDANTS
9 OR THE BLOCKBUSTER CLASS HERE HAS RIGHTS THAT ARE
10 FAR AND AWAY DIFFERENT THAN THE RIGHTS OF THE
11 REMAINDER OF THIS CLASS.

12 THE REAL MEAT OF THIS CASE AND THE REAL
13 REASON THAT FACEBOOK WANTS TO RESOLVE IT IS BECAUSE
14 OF VIDEO PRIVACY PROTECTION ACT CASES, YOUR HONOR.

15 I GOT A CALL FROM A PUBLIC INTEREST GROUP
16 IN WASHINGTON, D.C. LAST WEEK AND THEY'RE GOING TO
17 FILE AN AMICAS IN THE FIFTH CIRCUIT AND THEY WERE
18 URGING ME ON -- AND THIS GUY WORKED ON SENATOR
19 LEAHY'S STAFF AND THEY WERE PARTICULARLY CONCERNED
20 THAT BLOCKBUSTER WAS GOING --

21 THE COURT: WELL, WHETHER OR NOT HE
22 WORKED ON SENATOR LEAHY'S STAFF DOESN'T --

23 MR. WILSON: I UNDERSTAND THAT. HE
24 ASSISTED IN THE DRAFTING OF THE STATUTE, YOUR
25 HONOR. AND SO HE WAS VERY FAMILIAR WITH THE TERMS

1 OF THE STATUTE. AND THEY WANTED TO FILE AMICAS IN
2 THE FIFTH CIRCUIT BECAUSE THEY DON'T WANT THAT
3 ARBITRATION AGREEMENT TO STAND BETWEEN BLOCKBUSTER
4 AND THE CLASS GETTING RELIEF ON BLOCKBUSTER'S
5 BEHALF.

6 AND SO WE THINK THAT THAT ARBITRATION
7 DEFENSE AND THE WAY BLOCKBUSTER HAS BEEN ACTING
8 OVER HERE ARE VERY IMPORTANT SUBISSUES OF THIS
9 CLASS THAT NEED TO BE DECIDED.

10 THE COURT: DOESN'T THIS ALL BOIL DOWN TO
11 YOUR ARGUMENT THAT BECAUSE OF THE CLAIMS OF THE
12 BLOCKBUSTER PUNITIVE CLASS MEMBERS UNDER THE VPPA
13 THAT THERE'S NOT SUFFICIENT TYPICALITY IN THIS
14 CIRCUMSTANCE?

15 MR. WILSON: YES.

16 THE COURT: WELL, THAT ARGUMENT CAN BE
17 PRESENTED TO ME IN MY -- IN THIS CASE THAT THERE IS
18 ABSENCE OF TYPICALITY BECAUSE THERE ARE TYPICAL
19 UNIQUE RIGHTS, PERHAPS MORE UNDER YOUR THEORY, MORE
20 VALUABLE RIGHTS THAT THIS BLOCKBUSTER SUBCLASS MAY
21 HAVE.

22 WELL, IT'S CERTAINLY SOMETHING I CAN
23 EXPLORE, BUT THAT DOESN'T MEAN THAT YOU SHOULD BE
24 ACCORDED THE RIGHT TO INTERVENE WITH THE ULTIMATE
25 GOAL OF STOPPING THESE PROCEEDINGS AND HAVE

1 EVERYTHING SHIFT TO TEXAS, WHICH IS ULTIMATELY WHAT
2 YOU WANT AND YOU HAVE BEEN CANDID WITH ME IN TERMS
3 OF HOW YOU HAVE PRESENTED THE REASON, IF YOU WILL,
4 THAT YOU THINK YOU SHOULD INTERVENE.

5 AND THAT IS WHERE I DON'T SEE YOU HAVE A
6 RIGHT TO GO OUT THERE.

7 MR. WILSON: YOUR HONOR, THERE ARE
8 ACTUALLY CIRCUIT COURT OPINIONS DECIDED ON IN THE
9 SEVENTH CIRCUIT THAT SAYS THAT AS A GENERAL RULE WE
10 SHOULD BE ALLOWED TO INTERVENE IN AN ACTION AND
11 PRESENT OUR RIGHTS. WE'RE IN A UNIQUE POSITION
12 HERE.

13 THE COURT: YES, BUT YOU'RE TALKING ABOUT
14 MORE THAN INTERVENE AND PRESENT YOUR RIGHTS.

15 YOU'VE TOLD ME YOU'RE SEEKING TO
16 INTERVENE, YOU'RE SEEKING ON SOME BASIS, WHICH IS
17 NOT ENTIRELY CLEAR TO ME, MOVE TO TRANSFER THIS
18 CASE OUT OF THIS COURT AND INTO A FEDERAL COURT IN
19 TEXAS, WHICH ALSO WHAT YOU'RE INDICATING TO ME
20 CURRENTLY HAS BEFORE IT BUT A SUBSET OF THIS CASE
21 BECAUSE THAT'S ONE OF YOUR ARGUMENTS.

22 YOU'RE SAYING THIS IS A SMALL DISCRETE,
23 NOT SMALL NECESSARILY, BUT A DISCRETE SUBSET OF
24 WHAT IS IN FRONT OF ME BUT EVERYTHING SHOULD GO TO
25 TEXAS.

1 WELL, I DON'T QUITE UNDERSTAND THAT. I
2 MEAN, PRESUMABLY THERE ARE PUNITIVE MEMBERS OF THE
3 CLASS THAT ARE NOT BLOCKBUSTER FOLKS.

4 MR. WILSON: YES.

5 THE COURT: WHY SHOULD THEY GO TO TEXAS?
6 WHY SHOULD THEIR CLAIMS BE LITIGATED IN A TEXAS
7 DISTRICT COURT?

8 MR. WILSON: BECAUSE, YOUR HONOR, AS THE
9 FIRST COURT TO ACQUIRE SUBJECT MATTER JURISDICTION
10 OVER THIS ACTION, THE TEXAS COURT SHOULD BE, UNDER
11 THE PRINCIPLES WE SUBMITTED TO THE COURT, SHOULD BE
12 THE FIRST COURT TO GET TO RESOLVE THIS DISPUTE.

13 THE COURT: BUT UNDER YOUR THEORY ONLY
14 GOT THE BLOCKBUSTER CASE, RIGHT?

15 MR. WILSON: THAT'S CORRECT, YOUR HONOR,
16 ALTHOUGH WE'RE ALSO FILING A CLAIM AGAINST FACEBOOK
17 NOW THAT WE'RE AWARE THAT FACEBOOK IS MOVING TO
18 INDEMNIFY, AND WE HAVE MOVED TO CONSOLIDATE THOSE
19 ACTIONS.

20 THE COURT: WELL, THOSE THEN ARE NOT THE
21 THE FIRST FILED CLAIMS UNDER THE BLOCKBUSTER CASE
22 WERE FILED HERE.

23 MR. WILSON: WELL, ACTUALLY, YOUR HONOR,
24 WHAT THE CASE LAW SAYS IS THAT IF THEY'RE
25 CONSOLIDATED INTO THE TEXAS ACTION. IT DOESN'T

1 MATTER HOW OR WHEN THE PARTIES GOT TO BE APART OF
2 THAT ACTION. IT WAS THE FIRST COURT TO GET SUBJECT
3 MATTER JURISDICTION OVER THE ACTION.

4 THE COURT: OKAY.

5 MR. WILSON: BUT, YOUR HONOR, IF I MIGHT?

6 THE COURT: YES.

7 MR. WILSON: I CAN TELL THAT YOU'RE
8 RELUCTANT ABOUT THE TRANSFERS, AND I'M NOT
9 ABANDONING THAT REQUEST. WE WOULD LIKE THE CHANCE,
10 IF WE CAN INTERVENE, TO PRESENT FURTHER BRIEFING ON
11 THAT IF WE'RE ALLOWED TO BE PART OF THIS ACTION.

12 AND I'M IN NO MEANS ABANDONING THAT, BUT
13 THE ALTERNATIVE ARGUMENT I MADE IS THAT BECAUSE
14 WE'RE IN A UNIQUE POSITION OF HAVING -- OF
15 REPRESENTING THIS BLOCKBUSTER CLASS MEMBERS, WE
16 WOULD ALSO LIKE TO PRESENT ARGUMENTS TO YOU, EITHER
17 HERE TODAY, OR THROUGH -- WE HAVE ACTUALLY ASKED
18 FOR A BRIEFING SCHEDULE TO ALLOW US TO DO IT.

19 BECAUSE THERE'S REALLY NO PREJUDICE OF
20 WAITING AND ALLOWING THAT BRIEFING TO CONSIDER WHAT
21 WE'RE GOING TO SAY ON IT, BUT I THINK I CAN ADDRESS
22 A LOT OF THEM TODAY AS WELL BUT WITHOUT THE
23 DETAILED BRIEFING.

24 I DIDN'T WANT TO BOMBARD THE COURT WITH,
25 YOU KNOW, PAGES AND PAGES OF BRIEFING UNTIL I KNEW

1 IF YOU WERE GOING TO BE WILLING TO HEAR ABOUT IT.

2 THE COURT: WELL, WHAT BEYOND WHAT YOU
3 HAVE PRESENTED TO ME IS IT THAT YOU WANT TO
4 PRESENT?

5 MR. WILSON: I'D LIKE TO PRESENT, YOUR
6 HONOR, THE FACT THAT THIS IS A FEDERAL REGULATORY
7 STATUTE. AND ALLOWING A PLAINTIFF -- ALLOWING A
8 PERSON WHO GOES TO -- IF I COULD GIVE YOU A VERY
9 BRIEF EXAMPLE.

10 I'M A LAWYER. IF SOMEONE APPROACHES ME
11 AND SAYS YOU HAVE THIS CLIENT AND YOU HAVE PICTURES
12 OF HER THAT ARE IN A COMPROMISING POSITION AND WE
13 WOULD LIKE TO BUY THOSE PICTURES FROM YOU.

14 AND I SAY, NO, I CAN'T DO THAT. ONE, I
15 HAVE CONFIDENTIALITY PROBLEMS, BUT, TWO, SHE WILL
16 SUE ME FOR GIVING THAT INFORMATION AND I CAN'T
17 DISCLOSE THAT INFORMATION.

18 AND THEY SAY, DON'T WORRY, WE'LL PAY YOU
19 FOR ANY DAMAGES THAT MIGHT OCCUR AS A RESULT OF
20 THAT DISCLOSURE. I SAY, WELL, I'M COVERED, GREAT,
21 NO PROBLEM. HERE YOU GO.

22 THE LAW DOES NOT ALLOW WHEN I'M SUED BY A
23 CLIENT, IT DOES NOT ALLOW ME TO STEP IN AND SAY,
24 YOU PROMISED TO INDEMNIFY ME, COME OVER HERE FOR A
25 COUPLE OF DIFFERENT REASONS: ONE, BECAUSE IT

1 ENCOURAGES WRONGDOING, AND THAT'S EXACTLY WHAT IS
2 GOING ON HERE, YOUR HONOR.

3 THE COURT: WELL, THAT'S, AGAIN, THAT
4 IS -- YOU ARE LOOKING AT VARIOUS PROCEDURAL THINGS
5 THAT HAVE GONE ON, AND YOU'RE ASSUMING FROM THAT
6 ACTIVITY THAT THERE IS SOME ARRANGEMENT OR DEAL --
7 I TAKE IT THIS INDEMNITY ISSUE IS THAT YOU WERE
8 ASSERTING THAT THERE HAS BEEN SOME DEAL BETWEEN
9 FACEBOOK AND BLOCKBUSTER TO -- FOR FACEBOOK TO
10 INDEMNIFY BLOCKBUSTER; RIGHT?

11 MR. WILSON: YES, YOUR HONOR.

12 THE COURT: WELL, DO WE HAVE ANY -- I
13 MEAN, THAT'S A BIG ASSUMPTION. I.

14 MR. WILSON: BASICALLY I'VE BEEN ALL BUT
15 TOLD THAT, YOUR HONOR, THROUGH CONVERSATIONS.

16 THE COURT: ALL BUT TOLD THAT IS KIND OF
17 A TOUGH, YOU KNOW, BASIS FOR ME TO -- A DIFFICULT
18 BASIS FOR YOU TO ARGUE THAT I SHOULD ADMIT THAT AND
19 TO GIVE IT ANY CREDENCE AT ALL.

20 MR. WILSON: YOUR HONOR, I HAVE BEEN ALL
21 BUT TOLD THAT BY PLAINTIFF'S COUNSEL IN THIS CASE.

22 THE COURT: WELL, YOU KNOW, I'M VERY
23 TROUBLED BY PRESENTATIONS THAT ARE SO AND SO TOLD
24 ME THIS. AND I THINK YOU CAN UNDERSTAND WHY I
25 CAN'T OPERATE ON THE BASIS OF THAT KIND OF A

1 PRESENTATION. IT HAS TO BE IN A DECLARATION. IT
2 HAS TO BE OTHERWISE ADMISSIBLE.

3 I MEAN, I CAN'T JUST HAVE LAWYERS START
4 TO TELL ME, WELL, HE TOLD ME THIS. I MEAN,
5 THERE'S -- WE HAVE RULES IN THIS COURT.

6 MR. WILSON: WHAT YOU CAN DO, THOUGH,
7 YOUR HONOR, IN ACCORDANCE WITH THE PROCEDURE THAT
8 YOU WOULD BE EMPLOYING TODAY OF APPROVING THE
9 SETTLEMENT IS TO MAKE THAT INQUIRY.

10 YOU HAVE TO SHOW -- YOU HAVE TO FIND THAT
11 THIS WAS WITHIN THE THRESHOLD OF PERMISSIBLE
12 SETTLEMENT IN ORDER TO EVEN CONDITIONALLY CERTIFY
13 THIS CLASS. YOU HAVE TO FIND THAT THESE OTHER
14 REQUIREMENTS OF RULE 23 ARE MET.

15 AND WE WOULD SUBMIT THAT THE ABSENCE OF
16 THAT, IT'S A CRITICAL FACTOR, YOUR HONOR, BECAUSE
17 BY ALL APPEARANCES IT CERTAINLY APPEARS TO BE THAT
18 THAT'S WHAT IS BEING DONE HERE.

19 FACEBOOK IS NOT ACTING THROUGH ALTRUISTIC
20 MOTORS. THEY HAVE NOT DECIDED, GEE, WE WANT TO
21 SETTLE OUR LIABILITY, AND WE DON'T THINK ANYONE
22 ELSE OUGHT TO HAVE TO INCUR ANY LIABILITY EITHER.

23 THE COURT: WELL, IF WE'RE OPERATING IN
24 THE WORLD OF ASSUMPTIONS, IT'S VERY TYPICAL FOR A
25 PARTY THAT HAS THE POTENTIAL FOR BEING BROUGHT INTO

1 A CASE THAT IT'S TRYING TO SETTLE BY WAY OF A THIRD
2 PARTY, IF THAT THIRD PARTY GETS SUED, IT'S IN THE
3 SETTLING PARTY'S INTEREST TO TAKE CARE OF THAT.
4 NOT BECAUSE THEY'RE NICE TO THE OTHER PARTY OR
5 THEY'RE NOT ALTRUISTIC OR WHAT HAVE YOU, IT'S
6 BECAUSE THEY DON'T WANT TO SETTLE A CASE AND THEN
7 GET BROUGHT IN AGAIN WHEN THE THIRD PARTY GETS
8 SUED.

9 SO TO THE EXTENT THAT YOU SUGGEST THAT I
10 SHOULD BE CONCERNED THAT A SETTLING PARTY IS BY
11 VIRTUE OF THAT SETTLEMENT IS ALSO TRYING TO TAKE
12 CARE OF SOME CONTINGENT EXPOSURE, THAT HAPPENS
13 EVERY DAY AND THERE'S NOTHING WRONG WITH THAT.

14 AND IT IS ALSO NOT A REFLECTION OF THE
15 SETTLING PARTY HAVING SOME, THAT I HAVE TO SAY,
16 WELL, THEY MUST -- YOU KNOW, THERE'S SOMETHING THAT
17 IS SIGNIFICANTLY WRONG HERE WHEN A PARTY IS DOING
18 SOMETHING THAT IS GOING TO BENEFIT ANOTHER PARTY,
19 THERE MUST BE SOMETHING CURIOUS THERE.

20 BASICALLY IT WOULD BE THAT THEY'RE
21 PROTECTING THEIR OWN INTEREST BECAUSE THEY DON'T
22 WANT TO GET WALLOPED AFTER THEY SETTLE THE CASE.

23 MR. WILSON: ONE OF THE ALLEGATIONS IN
24 THIS CASE, WAS THAT BLOCKBUSTER AND FACEBOOK HAD A
25 CIVIL CONSPIRACY TO VIOLATE THE VIDEO PROTECTION